

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KIMBER L. HEINS,)	
)	No. CV-06-0348-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 20). Attorney Rebecca Coufal represents Plaintiff Kimber Heins (Plaintiff); Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

On May 2003, Plaintiff protectively filed her application for Social Security Income (SSI) benefits. (Tr. 87-90.) She alleged disability due to back and neck injury and chronic back pain, with an amended onset date of May 19, 2003. (Tr. 101, 475.) Benefits

1 were denied initially and on reconsideration. (Tr. 42, 48.)
2 Plaintiff requested a hearing before an administrative law judge
3 (ALJ). Hearings were held on July 28, 2005, October 6, 2005, and
4 November 7, 2005, before ALJ R.J. Payne. (Tr. 470-551.) During the
5 course of the hearings, lay witness George Shore, medical experts
6 George Weilepp, M.D., and Robert Berselli, M.D., and vocational
7 expert Sharon Welter testified. Plaintiff, who appeared in person
8 at the first hearing and testified telephonically at the October 6,
9 2005, hearing, was represented by counsel. (Tr. 471, 502-29.) The
10 ALJ denied benefits. After accepting and considering new evidence
11 submitted by Plaintiff, the Appeals Council denied review.¹ (Tr. 5-
12

13 ¹ When the Appeals Council evaluates the new evidence in the
14 context of denying review, the issue on appeal becomes whether the
15 record is limited to the evidence presented to the ALJ or also
16 includes the new evidence evaluated by the Appeals Council, but
17 never seen by the ALJ. In this circuit, when the Appeals Council
18 specifically considers new materials in the context of denying the
19 claimant's request for review, "we consider the rulings of both the
20 ALJ and the Appeals Council," and the record includes the ALJ's
21 decision as well as the new evidence. *Ramirez v. Shalala*, 8 F.3d
22 1449, 1452 (9th Cir. 1993); *Gomez v. Chater*, 74 F.3d 967, 971 (9th
23 Cir. 1996). Here, the new evidence submitted was medical records
24 dating from September 2005 through July 2006 documenting new
25 injuries to Plaintiff's left shoulder and right knee. (Tr. 409-69.)
26 The new evidence was considered by the court and is not material to
27 the current claim of impairment which alleges an onset date of May
28 2003. See 20 C.F.R. S 404.970 ; *Bates v. Sullivan*, 894 F.2d 1059,

6.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings, and are briefly summarized here. At the time of the hearing, Plaintiff was 41 years old with a thirteen year education. (Tr. 505, 509, 528.) She was divorced and had three children. (Tr. 219, 521-22.) She lived with her grandfather at his house, with two of her children; one son lived with his father out of town. (Tr. 522.) She had past work experience as an apartment house manager, bartender, groundskeeper, construction worker, janitor, and bar server. (Tr. 541-43.) She was in a serious car accident in the 1990's, and suffered back and neck injuries that required surgery in 1996. She was injured in motor vehicle accidents in 2002 and 2003. She had additional right shoulder surgery in 2003 and knee surgery in 2004. (Tr. 492-93.) Her activities of daily living included attending activities with her children, helping her father around his house, cooking, laundry, attending church twice a week and AA meetings once or twice a month. (Tr. 523-27.) She testified she could not work due to constant pain in her neck and thoracic when she moved her arms and neck, and pain in her lower back after sitting for longer than 15 minutes. (Tr. 507-08, 510.)

ADMINISTRATIVE DECISION

At step one, ALJ Payne found Plaintiff had not engaged in _____
1064 (9th Cir. 1990), *overruled on other grounds, Bunnell v. Sullivan*, 947 F.2d 341, 342 (9th Cir. 1991). However, such evidence may be the basis for a new application for SSI benefits.

1 substantial gainful activity during the relevant time. (Tr. 34.)
2 At step two, he found Plaintiff had the severe impairment of status
3 post right shoulder surgery, status post right knee surgery, and low
4 back disk injury, but determined at step three that they did not
5 meet or medically equal one of the listed impairments in 20 C.F.R.,
6 Appendix 1, Subpart P, Regulations No. 4 (Listings). (Id.) The ALJ
7 found Plaintiff's allegations regarding limitations were not totally
8 credible. (Tr. 30, 34.) At step four, he determined Plaintiff had
9 a residual functional capacity (RFC) for a wide range of light work
10 with the following limitations:

11 She must alternate sitting and standing every 50 minutes
12 with a 10 minute break in between. She should avoid
13 repetitive overhead work with the right arm and pushing
14 and pulling in excess of 5 pounds. She can occasionally
15 reach overhead with the right arm. She can occasionally
16 climb ramps, stairs, ladders or scaffolds. She should
17 avoid climbing ropes, crouch, or crawl. She can
18 occasionally engage in balancing or kneeling. She should
19 avoid exposure to industrial vibration. Additionally, she
20 has mild to moderate, frequent complaints of pain and
21 takes over the counter medication, however, despite the
22 level of pain and/or the effects of medication, she would
23 be able to remain reasonably attentive and responsive in
24 a work setting and would be able to carry out normal work
25 assignments satisfactorily.

19 (Tr. 34.)

20 The ALJ concluded Plaintiff could perform her past relevant
21 work as an apartment manager. (Id.) Proceeding to step five, the
22 ALJ made the alternative finding that Plaintiff could perform other
23 jobs in the national economy and, therefore, was not under a
24 "disability" as defined by the Social Security Act. (Tr. 35.)

25 STANDARD OF REVIEW

26 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
27 court set out the standard of review:

1 A district court's order upholding the Commissioner's
 2 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 3 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 4 Commissioner may be reversed only if it is not supported
 5 by substantial evidence or if it is based on legal error.
 6 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 7 Substantial evidence is defined as being more than a mere
 8 scintilla, but less than a preponderance. *Id.* at 1098.
 9 Put another way, substantial evidence is such relevant
 10 evidence as a reasonable mind might accept as adequate to
 11 support a conclusion. *Richardson v. Perales*, 402 U.S.
 12 389, 401 (1971). If the evidence is susceptible to more
 13 than one rational interpretation, the court may not
 14 substitute its judgment for that of the Commissioner.
 15 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
 16 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

17 The ALJ is responsible for determining credibility,
 18 resolving conflicts in medical testimony, and resolving
 19 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 20 Cir. 1995). The ALJ's determinations of law are reviewed
 21 *de novo*, although deference is owed to a reasonable
 22 construction of the applicable statutes. *McNatt v. Apfel*,
 23 201 F.3d 1084, 1087 (9th Cir. 2000).

14 SEQUENTIAL PROCESS

15 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 16 requirements necessary to establish disability:

17 Under the Social Security Act, individuals who are
 18 "under a disability" are eligible to receive benefits. 42
 19 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 20 medically determinable physical or mental impairment"
 21 which prevents one from engaging "in any substantial
 22 gainful activity" and is expected to result in death or
 23 last "for a continuous period of not less than 12 months."
 24 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 25 from "anatomical, physiological, or psychological
 26 abnormalities which are demonstrable by medically
 27 acceptable clinical and laboratory diagnostic techniques."
 28 42 U.S.C. § 423(d)(3). The Act also provides that a
 claimant will be eligible for benefits only if his
 impairments "are of such severity that he is not only
 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

In evaluating whether a claimant suffers from a

1 disability, an ALJ must apply a five-step sequential
2 inquiry addressing both components of the definition,
3 until a question is answered affirmatively or negatively
4 in such a way that an ultimate determination can be made.
5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
6 claimant bears the burden of proving that [s]he is
7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
8 1999). This requires the presentation of "complete and
9 detailed objective medical reports of h[is] condition from
10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
11 404.1512(a)-(b), 404.1513(d)).

12 It is the role of the trier of fact, not this court, to resolve
13 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
14 supports more than one rational interpretation, the court may not
15 substitute its judgment for that of the Commissioner. *Tackett*, 180
16 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
17 Nevertheless, a decision supported by substantial evidence will
18 still be set aside if the proper legal standards were not applied in
19 weighing the evidence and making the decision. *Browner v. Secretary*
20 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
21 there is substantial evidence to support the administrative
22 findings, or if there is conflicting evidence that will support a
23 finding of either disability or non-disability, the finding of the
24 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
25 1230 (9th Cir. 1987).

26 ISSUES

27 The question is whether the ALJ's decision is supported by
28 substantial evidence and free of legal error. Plaintiff argues the
ALJ erred when he: (1) improperly rejected her treating physician's
opinions; (2) assessed her credibility; (3) presented an incomplete
hypothetical question to the vocational expert; (4) failed to
consider the effects of her impairments in combination; and (5)

1 failed to consider properly lay testimony. (Ct. Rec. 18.)

2 **DISCUSSION**

3 **A. Credibility**

4 In his sequential evaluation, the ALJ found Plaintiff was "less
5 than fully credible," and discounted her subjective complaints
6 regarding functional limitations caused by pain. (Tr. 30.) When
7 the ALJ finds the claimant's statements as to the severity of
8 impairments and limitations is unreliable, the ALJ must make a
9 credibility determination with findings sufficiently specific to
10 permit the court to conclude the ALJ did not arbitrarily discredit
11 claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959
12 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir.
13 1991) (en banc). The ALJ may consider the following factors when
14 weighing the claimant's credibility: the claimant's reputation for
15 truthfulness, inconsistencies either in her allegations of
16 limitations or between her statements and conduct, daily activities
17 and work record, and testimony from physicians and third parties
18 concerning the nature, severity, and effect of the alleged symptoms.
19 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If
20 the ALJ's credibility finding is supported by substantial evidence
21 in the record, the court may not engage in second-guessing. See
22 *Morgan*, 169 F.3d at 600. If there is no affirmative evidence that
23 the claimant is malingering, the ALJ must provide "clear and
24 convincing" reasons for rejecting the claimant's allegations
25 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715,
26 722 (9th Cir. 1998).

27 Here, Plaintiff presented medical records showing she had
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1 musculoskeletal conditions that could reasonably be expected to
2 produce pain. She testified she could not walk more than one half
3 mile, could not stand or sit for more than 15 minutes, could not
4 lift more than twenty pounds and suffered pain constantly at varying
5 levels of intensity. (Tr. 510-14.) She stated she took only over
6 the counter pain medicine two or three times a week if the pain got
7 too bad, but it upset her stomach. (Tr. 509.)

8 An ALJ cannot be required to believe every allegation of
9 disabling pain, or else disability benefits would be
10 available for the asking, a result plainly contrary to 42
11 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
12 the claimant introduces medical evidence showing that he
has an ailment reasonably expected to produce some pain;
many medical conditions produce pain not severe enough to
preclude gainful employment.

13 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Subjective
14 complaints alone cannot be the basis for a finding of disability.
15 Further, the ALJ need not completely reject nor completely accept
16 the claimant's allegations. SSR 96-7p.

17 In his credibility findings, the ALJ referenced evidence in the
18 record that, contrary to her complaints of constant pain, Plaintiff
19 had not sought treatment at a pain clinic or any other form of pain
20 management regime, had not been prescribed pain medication by her
21 doctors and took only over the counter medication. He also found
22 she did not provide records to support alleged trips to the
23 emergency room (ER) for treatment of chronic pain when it got bad.
24 (Tr. 30.) Although the record contains evidence of ER visits, as
25 the ALJ stated, these visits were precipitated by events such as
26 work-related pain after her car accident, a calf injury while
27 boating that was aggravated while Plaintiff was on vacation, back
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1 pain after moving boxes in November 2003, headaches and strep
2 throat, and a fall down the stairs. (Tr. 223, 226, 231, 326, 330,
3 334.) The record does not support Plaintiff's allegation that she
4 sought ER treatment for chronic pain. The court also notes on
5 independent review that on November 29, 2003, she told ER personnel
6 she had moved boxes initially, but denied any "recent trauma" the
7 next day. (Tr. 231, 239.) She denied taking prescribed pain
8 killers at the hearing (Tr. 509), but records indicate she was
9 taking Percocet and Oxycodon. (Tr. 239, 268.)

10 The ALJ also found her complaints of symptoms and impairments
11 were inconsistent with objective medical evidence and the opinions
12 of her treating doctor. (Tr. 30, 342, 510-12.) In October 2003,
13 treating physician Vanderwilde strongly recommended physical therapy
14 and a home-strengthening program. (Tr. 265.) On December 16, 2003,
15 Dr. Vanderwilde examined Plaintiff, who complained of right knee
16 problems. He noted that Plaintiff "continues to work through pain,"
17 and never had participated in formal physical therapy. (Tr. 340.)
18 The record includes several references to Plaintiff's failure to
19 follow the course of recommended physical treatment, which was
20 considered effective in resolving the pain issues from her accidents
21 and surgeries. (Tr. 169, 175, 177, 179, 193, 262.) This lack of
22 consistent treatment follow-up and inconsistencies between the
23 medical records and Plaintiff's self-reported activities of daily
24 living and participation in her children's activities, travel and
25 recreation, (Tr. 507, 523-28), are "clear and convincing" reasons to
26 support the ALJ's finding that Plaintiff was not fully credible as
27 to the severity of her pain. *Rollins v. Massanari*, 261 F.3d 853,
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1 856-57 (9th Cir. 2001). Although the record supports the ALJ's
2 findings that Plaintiff experienced pain from her musculoskeletal
3 impairments, the evidence in its entirety may be rationally
4 interpreted that her level of pain does not render her totally
5 disabled as claimed.

6 **B. Treating Physician Medical Opinions**

7 Plaintiff claims the ALJ improperly rejected the opinions of
8 her treating physician and failed to consider mental impairments
9 assessed by examining psychologist Gary Lauby, Ph.D., when he
10 determined her impairments were not disabling. (Ct. Rec. 8 at 6,
11 8.)

12 In a disability proceeding, it is the role of the ALJ to
13 resolve conflicts in medical evidence. A treating physician's
14 opinion is given special weight because of his familiarity with the
15 claimant and her physical condition. See *Fair v. Bowen*, 885 F.2d
16 597, 604-05 (9th Cir. 1989). If the treating physician's opinion is
17 not contradicted, it can be rejected only with "clear and
18 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1995). If contradicted, the ALJ may reject the opinion if he states
20 specific, legitimate reasons that are supported by substantial
21 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
22 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. Furthermore, a
23 treating physician's opinion "on the ultimate issue of disability"
24 must itself be credited if uncontroverted and supported by medically
25 accepted diagnostic techniques unless it is rejected with "clear and
26 convincing" reasons. *Holohan v. Massanari*, 246 F.3d 1195, 1202-03
27 (9th Cir. 2001).

1 To meet this burden, the ALJ can set out a detailed and
2 thorough summary of the facts and conflicting clinical evidence,
3 state his interpretation of the evidence, and make findings.
4 *Thomas*, 278 F.3d at 957; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
5 Cir. 1989). The ALJ is not required to accept the opinion of a
6 treating or examining physician if that opinion is brief, conclusory
7 and inadequately supported by clinical findings. *Id.* Further, a
8 plaintiff's credibility is an appropriate factor to consider when
9 evaluating medical evidence. See *Webb v. Barnhart*, 433 F.3d 683,
10 688 (9th Cir. 2005). Where a claimant alleges a disabling pain, an
11 ALJ "may not discredit a claimant's testimony of pain and deny
12 disability benefits solely because the degree of pain alleged by the
13 claimant is not supported by objective medical evidence." *Bunnell*,
14 947 F.2d at 345-46; *Cotton v. Bowen*, 799 F.2d 1403 (9th Cir. 1986);
15 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Nonetheless, where the
16 claimant introduces medical evidence showing that she has an ailment
17 reasonably expected to produce pain, an ALJ is not required to
18 believe the allegations of severity; many medical conditions produce
19 pain not severe enough to preclude gainful employment. *Fair v.*
20 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

21 Here, Plaintiff submitted extensive records from her treating
22 orthopedist, Russell Vanderwilde, M.D., that documented her
23 musculoskeletal injuries and treatment. (Tr. 246-75, 340-47.) The
24 ALJ found these conditions severe and reasonably expected to cause
25 pain. (Tr. 29, 31.) However, the ALJ rejected limitations opined
26 by Dr. Vanderwilde in a Medical Source Statement, signed June 30,
27 2005, in which Dr. Vanderwilde summarily concluded that Plaintiff
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1 could sit one hour at a time, for three hours, stand two hours at a
2 time for a total of four hours, and walk two hours at a time for
3 four hours. (Tr. 31, 342.) Dr. Vanderwilde also opined Plaintiff
4 was limited to lifting and carrying no more than 10 pounds
5 occasionally, with no repetitive use of her right hand for pushing
6 or pulling. He found she could occasionally bend, squat crawl,
7 climb and reach above the shoulder level, with no environmental
8 restrictions. (Id.)

9 The ALJ thoroughly summarized Dr. Vanderwilde's records (Tr.
10 23, 25-28, 31.) In rejecting the degree of limitation opined by Dr.
11 Vanderwilde in his Medical Source Statement, the ALJ reasoned that
12 Dr. Vanderwilde's clinical notes indicated Plaintiff had improved
13 after her surgeries, and his conclusion that Plaintiff was unable to
14 do any type of work was based on her self-report, which the ALJ
15 properly found not fully credible. This is a legitimate reason for
16 discounting a treating physician's opinion. *Morgan*, 169 F.3d at
17 600-02.

18 The ALJ also relied on medical expert testimony and agency
19 consultants' opinions that Plaintiff's RFC was not as limited as
20 that found by Dr. Vanderwilde. (Tr. 31.) Medical expert Robert
21 Berselli, orthopedic surgeon, gave a detailed analysis of the
22 medical records and other evidence, and opined Plaintiff was limited
23 as follows: she could lift or carry 25 pounds with both hands
24 occasionally and ten pounds frequently; she could walk or stand for
25 six out of eight hours, and sit six out of eight hours, alternating
26 every 50 minutes, with a ten minute break. She could not push/pull
27 repetitively more than five pounds with her right hand or arm. She
28

1 should never crouch or crawl, but could occasionally stoop. She
2 could occasionally climb ramps, stair, ladders, scaffolds, but no
3 ropes. Overhead reaching with her right arm was limited to
4 occasionally, but never repetitive. She should also avoid heavy
5 industrial vibration, that would affect her back. (Tr. 496-99.)
6 The nature of functional limitations opined by Dr. Berselli is
7 substantially consistent with Dr. Vanderwilde and medical expert
8 George Weilepp, M.D., and orthopedic surgeon, who testified at the
9 July 28, 2005, hearing. (Tr. 474-86.)

10 Testimony of a medical expert may serve as substantial evidence
11 when supported by other evidence in the record. *Magallanes v.*
12 *Bowen*, 881 F.2d at 755. Here, the medical experts were specialists
13 in orthopedics whose opinions are given special weight. 20 C.F.R.
14 § 416.927(d)(5). Both experts gave detailed testimony explaining
15 the evidence and their findings. The functional limitations opined
16 are substantially consistent with Dr. Vanderwilde's findings,
17 differing primarily in the degree of severity of Plaintiff's
18 exertional limitations. The variance in degree of severity is
19 rationally interpreted as reflecting the medical experts' and the
20 ALJ's ability to review the record as a whole, including issues of
21 credibility, in making their capacity assessments. See SSR 96-8p;
22 SSR 96-5p (the RFC is the adjudicator's finding based on all
23 relevant evidence in the case record). The ALJ did not err in
24 considering the medical expert testimony in assessing Plaintiff's
25 RFC.

26 Finally, it is well settled that the ALJ is "responsible for
27 determining credibility, resolving conflicts in medical testimony
28

1 and for resolving ambiguities," in these proceedings. *Richardson*,
2 402 U.S. at 400; *Andrews*, 53 F.3d at 1039; SSR 96-8p. The final
3 determination regarding a claimant's ability to perform basic work
4 is the sole responsibility of the Commissioner. 20 C.F.R. §
5 416.946; SSR 96-5p (RFC assessment is an administrative finding of
6 fact reserved to the Commissioner). Considering Plaintiff's
7 credibility, her testimony regarding her activities of daily living,
8 and the fact that the specialized medical experts' opinions were
9 based on the entire record, the evidence reasonably supports the
10 ALJ's evaluation and rejection of Dr. Vanderwilde's opinions
11 regarding the severity of Plaintiff's work-related limitations. The
12 ALJ did not err in his RFC determination.

13 **C. Step Five: Hypothetical Question**

14 At step five, the burden shifts to the Commissioner to show
15 that there is a significant number of jobs in the national economy
16 that the claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
17 (9th Cir. 1984). The ALJ may use the testimony of a vocational
18 expert to identify appropriate jobs. SSR 00-4p. The hypothetical
19 posed to the vocational expert must accurately reflect the
20 claimant's physical and mental limitations determined credible and
21 supported by the record. *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-63
22 (9th Cir. 2001); *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988);
23 *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991). The
24 hypothetical question presented to vocational expert Sharon Welter
25 (VE) by the ALJ contained the following limitations, which were
26 consistent with the limitations opined by Dr. Berselli (Tr. 495-99),
27 and to some degree, more restrictive than the ALJ's final RFC
28

1 determination quoted above:

2 [T]his individual would be able to occasionally lift
3 and/or carry 25 pounds. Frequently lift and/or carry 10
4 pounds. Stand, and/or walk about six hours in an eight
5 hour work day. Sit about six hours in an eight hour work
6 day. Would need to periodically alternate sitting and
7 standing every - - the individual would be able to sit or
8 stand for 50 minutes at a time.

9 . . .

10 . . . with maybe approximately 10 minute alteration [sic].
11 This individual would be limited in the upper extremities
12 to no repetitive pushing or pulling with the right arm, of
13 more than five pounds. Objects weighing more than five
14 pounds. The purpose to control no more than five pounds of
15 force, nor they should never climb ropes. Could
16 occasionally climb ladders, rope - - ladders, scaffolds,
17 ramps and stairs. Could occasionally balance, kneel, and
18 stoop. This individual should occasionally , but would
19 only occasionally be able to do overhead reaching with the
20 right arm. And the individual is right arm dominant. And
21 lastly, as far as nonexertional imitations, should avoid
22 all exposure to heavy industrial type vibration. . . .
23 [T]he individual has the physical and mental
24 symptomatology to include mild and moderate frequent pain.
25 That the individual would take prescription medication for
26 the relief of his or her symptomatology. However, despite
27 the levels of pain and/or effects of the medication, the
28 individual would be able to remain reasonably attentive
and responsive in a work setting. And would be able to
carry out normal work assignments satisfactorily.

(Tr. 544-45.)

Plaintiff's argument that the ALJ failed to consider all of her
impairments in combination is without merit. The hypothetical and
the final RFC determination encompass back, shoulder and neck
injuries, as well a mild to moderate pain, which was treated with
medication. (Id.)

Regarding emotional or psychological impairments, Plaintiff
clearly stated at the hearing that her neck, thoracic and lower back
pain kept her from working. (Tr. 507.) Plaintiff cites to Dr.
Lauby's evaluation as support for her argument that there should

1 have been a finding of mental impairments, and that psychological
2 limitations should have been included in the ALJ's hypothetical.
3 (Ct. Rec. 22 at 2). However, Dr. Lauby's diagnosis of depressive
4 disorder, recurrent, moderate, on the psychological evaluation form
5 (Tr. 215) conflicts with his narrative report, which contains no
6 diagnosis of depression and describes Plaintiff as independent in
7 her activities of daily living, demonstrating conventional levels of
8 emotional and behavioral control. (Tr. 221-22.) He observed no
9 signs of depression and reported Plaintiff's statements that pain
10 was her primary barrier to work, and that she did not believe she
11 was mentally ill. (Tr. 28-29, 221-22.)

12 As noted by the ALJ in finding of no severe mental impairment,
13 Plaintiff's application for social security benefits does not list
14 mental impairments. (Tr. 28, 101.) Plaintiff did not allege
15 emotional problems during her testimony. The record indicates
16 Plaintiff took Prozac for depression from pain, PMS and stress, but
17 no other mental health treatment was recommended or pursued. (Tr.
18 28, 155, 218.) Further, there is no evidence in the record that
19 limitations caused by mental conditions persisted more than twelve
20 months or affected Plaintiff's ability to work in any way. The ALJ
21 did not err in finding no limitations caused by mental impairments.

22 In response to the ALJ's hypothetical, the VE found there were
23 numerous light level and sedentary level jobs in Washington State
24 that Plaintiff could perform: a mail clerk, office helper parking
25 lot attendant, as well as surveillance camera monitor in casinos,
26 telemarketer and cashier II. (Tr. 546-47.) The VE also considered
27 the additional limitation as propounded by Plaintiff's counsel, and
28

1 testified that even with a limitation of sitting for one hour at a
2 time for a total of three hours per day, the additional restriction
3 would not affect Plaintiff's ability to perform the sedentary jobs
4 identified, which allowed for an alternating sitting/standing
5 option. (Tr. 547-48.) Because the hypothetical question presented
6 by the ALJ included all limitations reasonably supported by the
7 record, the VE's testimony is substantial evidence. The
8 Commissioner met his burden at step five.

9 **D. Lay testimony**

10 Plaintiff argues the ALJ improperly rejected testimony from lay
11 witness, George Shore. Lay witness testimony as to a claimant's
12 symptoms or how an impairment affects ability to work is competent
13 evidence and must be considered by the ALJ. If lay testimony is
14 rejected, the ALJ must give reasons that are germane to each
15 witness. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Mr.
16 Shore worked with Plaintiff on construction, and visited with her
17 about once a month. (Tr. 532.) He testified Plaintiff could no
18 longer do the physical labor she did before her car accidents, and
19 that she complained of pain and is unable to ride bikes with him and
20 her children. (Tr. 534.) The ALJ properly considered Mr. Shore's
21 statements, and consistent with his testimony, found Plaintiff could
22 no longer do construction work, and suffered mild to moderate
23 frequent pain. (Tr. 32, 34.) The ALJ properly considered Mr.
24 Shore's testimony.

25 **CONCLUSION**

26 The ALJ thoroughly detailed the medical evidence in the record
27 and properly evaluated the medical opinions in considering
28

1 Plaintiff's impairments alone and in combination. His determination
2 of non-disability is based on substantial evidence and free of legal
3 error. Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
6 **DENIED;**

7 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
8 **GRANTED;**

9 The District Court Executive is directed to file this Order and
10 provide a copy to counsel for Plaintiff and Defendant. Judgment
11 shall be entered for Defendant, and the file shall be **CLOSED**.

12 DATED August 27, 2007.

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14 S/ CYNTHIA IMBROGNO
15 UNITED STATES MAGISTRATE JUDGE
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